IN THE

Supreme Court of the United States

OCTOBER TERM 1980

NO. 80-1242

MISSOURI PACIFIC RAILROAD COMPANY,
Petitioner

v.

LOY D. ALCORN,
Respondent

On Appeal from Texas Court of Civil Appeals Fourteenth Supreme Judicial District of Texas

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether there was any evidence to support the Jury findings that railroad employees, acting in the scope of their employment, were negligent.

2. Whether there was any evidence to support the Jury finding that the railroad was negligent for failing to discipline its employees for prior rule violations.

STATEMENT OF THE CASE

This case does not turn upon the definition of "employee" as used in 45 U.S.C., § 51, or upon the restrictiveness or liberality to be applied to the scope of employment. Neither does this case rise or fall upon the railroad's responsibility under the F.E.L.A. for an intentional act involving a prank or practical joke. If it did, sharp issue would be taken with Petitioner's statements of "black letter law" and restrictive cases cited which do not fairly portray the current attitude of appellate courts to broaden the scope of employer liability.[1]

Instead, this case simply involves a review of the testimony to determine whether there was any evidence to support one or more of the four separate sets of negligence and causation issues found by the jury in favor of Respondent Alcorn. The railroad, for obvious reasons, has chosen to focus on certain carefully selected sections in the opinion of the appellate court rather than upon the entire opinion and the facts which form the basis for the court's ruling. Those facts warrant inspection by this Court.

On February 1, 1976, the crew of the Amoco Switcher was required to wait with its train on the main line until the Angleton Switcher, coming from the opposite direction, could reach the siding and clear the main line. While waiting, the fireman on the Amoco crew, Mr. Calloway, placed multiple torpedoes on the rail of the siding over

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1. *See Baker v. Baltimore & Ohio R.R. Co.*, 502 F.2d 638, 642 (6th Cir. 1974) where the court argued that the F.E.L.A. is not subject to traditional interpretations of course and scope of employment and that the better rule would be to make the railroad liable "for all negligent acts by employees which occur during the hours of employee's working day on the employer's premises."

which the Angleton Switcher would pass. Such conduct, regardless of motivation, was clearly in violation of the Railroad's operating and safety rules. The placement of these torpedoes, conceded by all to be dangerous instrumentalities, was done in the presence and full sight of the other Amoco crew members, including Engineer Baucom and Conductor Peavy. Rule 107 of Petitioner's operating rules makes both men jointly responsible for seeing that their crew follows the company's rules and that the work is done in a safe and proper manner. Both men denied being participants in the prank. Both conceded their supervisory positions required an attempt to stop or prevent such a violation of the rules. Unfortunately, neither said nor did anything to halt or discourage the prank.

As the Angleton Switcher approached, Engineer Baucom signaled Mr. Alcorn to leave the relative safety of his engine, which caused him to reach the ground between the two trains at the time and place where the series of explosions occurred. There was testimony that he knew the torpedo placement when he gave the signal, yet he denied involvement in the prank. Mr. Alcorn's hearing was permanently damaged to the extent that he can no longer work for the railroad.

This incident was not an isolated occurrence. The misuse of torpedoes had progressed to the point that it was past practice in the Kingsville Division. It literally "happened all the time," according to Engineer Baucom. Every railroad employee, except Mr. Holloway, the Company's designated official representative, testified that in the past they had heard torpedoes explode in the yards where they did not belong. One employee stated he did not report such occurrences to company officials because

he assumed they already knew about it since the torpedoes were so loud when exploded they could be heard by anyone in the yard area.

Mr. Holloway conceded that the only way to stop horseplay involving rule violations that endangered others was to discipline those involved. In the seventeen years before this event, not one single employee was disciplined in any fashion for the "many, many times" these violations occurred. Not one safety meeting was called or one bulletin or memorandum written and posted to warn the employees that such conduct would not be tolerated.

Mr. Calloway testified he had no fear of being fired for his violation of the rules on this occasion. His confidence was justified. The company officials learned of his participation immediately following the event, but took no steps to discipline or even reprimand him for violating its rules. Nor did the company punish the engineer and conductor for their failure to properly supervise their crew.

ARGUMENT

The standards of review by this Court of a favorable jury verdict for a railroad employee such as Mr. Alcorn under the F.E.L.A. are extremely limited. *Rogers v. Missouri Pacific R.R. Co.*, 352 U.S. 500 (1957). There must be "a complete absence of probative facts to support the conclusion reached" to create reversible error. *Lavender v. Kurn*, 327 U.S. 645, 653 (1946). Mr. Alcorn is to be given the benefit of any doubt in making the evidentiary determination. *Gallick v. Baltimore & Ohio R.R. Co.*, 372 U.S. 108, 116 (1963). Congress intended for the jury to determine these cases, and that tribunal

role has been carefully guarded by this Court through the years. *Bailey v. Central Vermont Ry.*, 319 U.S. 350, 354 (1943); *Rogers, supra* at 510; *Ellis v. Union Pacific R.R. Co.*, 329 U.S. 649 (1947) (jury has choice of conflicting versions of how the accident happened, who was telling the truth and inferences drawn from uncontroverted facts).

This Court recognized that the F.E.L.A. was a distinct departure from the rules of common law. *Sinkler v. Missouri Pacific R.R. Co.*, 356 U.S. 326 (1958). In *Sinkler* the rationale for the liberal purpose of the Act was clearly established. The railroads had the economic resources to bear the burden of injury caused by the negligence of a co-employee and justice demanded the protection of those involved in the common pursuit. In *Baker v. Baltimore & Ohio R.R. Co., supra* at 642, the court held that scope of employment included both actual service and "those things necessarily incident thereto." This Court recognized resting while on duty as falling within that definition. *North Carolina R.R. v. Zachary*, 232 U.S. 248 (1914).

The railroad has concentrated its focus on Mr. Calloway and his intentional activity[2] and has chosen to ignore the conduct of its other employees who were not engaged in the practical joke. As previously seen, Alcorn's primary complaint was the failure of the Amoco crew's conductor and engineer to follow Rule 107.

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2. Petitioner has not attempted to distinguish the line of cases beginning with this Court's decision in *Lillie v. Thompson*, 332 U.S. 459 (1947) and continuing with *Harrison v. Missouri Pacific R.R. Co.*, 372 U.S. 248 (1963) which extended the railroad's responsibility to foreseeable dangers from intentional or criminal misconduct, which did not necessarily occur in furtherance of the employer's business. *Slaughter v. Atlantic Coast Line R.R. Co.*, 302 F.2d 912, 916 (D.C. 1962).

A somewhat similar situation existed in *Claris v. Oregon Short Line,* 51 P.2d 217 (Idaho, 1935), *cert. den.* 297 U.S. 714 (1935). In that case an employee put water in a grease gun as a joke. Plaintiff's supervisor knew the water was in the gun, yet allowed the plaintiff to use it, thereby causing injury. The court rejected the argument that the supervisor was not in the course and scope of employment and upheld a jury finding that the railroad failed to furnish plaintiff with a safe tool.

It must be conceded by the railroad that Peavy and Baucom were paid to supervise the crew and see that the rules were followed. Their duty to supervise according to the rules arose from the work they were employed to do. A similar situation occurred in *Mileski v. Long Island R.R. Co.,* 449 F.2d 1169 (2d Cir. 1974) where the court upheld negligence findings predicated on the railroad supervisors' laxity in enforcing the company's rules requiring goggles to be worn. The instant event occurred during normal work hours on the railroad premises while the Amoco crew was forced to wait to proceed with its work. The only thing that could possibly have removed them from the control of the railroad would have been their participation in the prank. Both supervisors flatly denied involvement.

Since the negligence of both supervisors in allowing the placement of the torpedoes grew out of their work, the test referred to by Petitioner in *Goupiel v. Grand Trunk Ry.,* 96 Vt. 191, 118 A. 586 (Vt. 1922) is satisfied as to them. It is immaterial to examine more recent opinions such as *Ira S. Bushey & Sons, Inc. v. United States,* 398 F.2d 167 (2d Cir. 1968) which greatly expand an employer's vicarious liability. The most restrictive definition of course and scope of employment would cover Baucom and Peavy in this case.

The railroad complains bitterly about the language used in the appellate court's decision. Such complaint is ill-founded. The court below held, in accordance with *Sinkler*, that any evidence of injury caused by the negligence of "a co-worker who was at the time under the railroad's control" would require affirmance.[3] Obviously, an employee engaged in a purely personal unforeseeable endeavor would not be under the control of his employer. *Brooks v. Washington Terminal Co.*, 593 F.2d 1285 (D.C. 1979). Control of the employer would extend, however, under the facts of this case, to those employees (Peavy and Baucom) whose negligence arose out of their failure to perform the duties they were hired to do. The court's holding, therefore, is correct under the evidence.

FAILURE TO DISCIPLINE

A completely independent basis of recovery was the finding that the railroad was negligent for failing to discipline its employees prior to this episode. The testimony cited earlier at least created a fact issue as to whether the railroad had habitually disregarded the rules relating to torpedo misuse. In *Descoteau v. Boston & Maine R.R.*, 140 A.2d 579, 583 (N.H. 1958) the testimony revealed ample evidence of the common use of kerosene by employees to start fires over a period of years in violation of the company's rule. The court held that habitual disregard of the rule by employees warranted a finding that the railroad knew of the practice and was negligent for not enforcing the rule.

Whether the railroad had actual notice, as the excluded testimony of Mr. Darrington indicates,[4] or constructive

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3. See opinion, Petitioner's brief, Appendix A at A-3.

4. Mr. Darrington testified on a Bill of Exceptions that he knew of rare instances of torpedo misuse while he was a company official, but no discipline resulted.

knowledge based upon the repetitious violation of the rules over the years, the evidence warrants the finding of negligence. The jury rejected the company's attempt to claim trespassers or vandals were setting the torpedoes. Instead, the evidence supported the belief by the jury that the railroad simply looked the other way when it came to its employees playing with torpedoes.

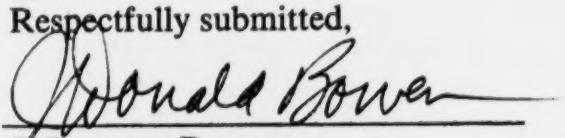
SUMMARY

The verdict of the trial court is on sound footing in several areas involving evidence of both employee negligence under the *respondeat superior* doctrine and direct negligence for the company's failure to discipline. Therefore, the verdict must be affirmed. Additionally, the language of the Court of Civil Appeals' opinion, when read in its entirety in light of the evidence, accurately states the law as it has long been recognized in F.E.L.A. cases.

CONCLUSION

For these reasons the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

By: 

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of February, 1981, three copies of this Brief in Opposition to Petition for Writ of Certiorari were mailed, by first class mail, postage prepaid, to Ben G. Sewell, Gordon A. Holloway, and Claude R. Treece of Sewell & Riggs, 900 Capital National Bank Building, Houston, Texas 77002, counsel for Petitioner. I further certify that all parties required to be served have been served.

J. Donald Bowen

J. DONALD BOWEN